No. 88-1770

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

WESTINGHOUSE ELECTRIC CORPORATION,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The Solicitor General, in his Brief, has requested that the Court vacate the judgment of the Third Circuit, and remand this case for further consideration in light of this Court's decision in *Public Employees Retirement System of Ohio v. Betts*, 109 S. Ct. 2854 (1989). For the reasons stated below, Westinghouse submits that the Court should grant the writ, summarily reverse the judgment against Westinghouse, and direct a dismissal of the case.

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* Pursuant to Supreme Court Rule 28.1, Westinghouse has listed its parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates in its Petition for a Writ of Certiorari previously filed with this Court.

DISCUSSION

The Third Circuit held below that Westinghouse violated section 4(a)(1) of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623(a)(1), when it paid severance benefits only to laid off employees who were not eligible for, or who did not elect to receive, various forms of retirement benefits under its pension plans. The court further held that Westinghouse's severance and pension benefit plans were not protected by section 4(f)(2) of the ADEA, 29 U.S.C. § 623(f)(2), because those plans were not "bona fide employee benefit plans" within the meaning of the ADEA. The basis for the court's latter finding was that Westinghouse's severance and pension benefit plans merely provided "fringe benefits" and did not involve age-related cost factors. Cert. App., at 25a-29a.

In its petition for a writ of certiorari, Westinghouse submitted that the Third Circuit's decision was erroneous for two reasons: (1) Westinghouse had not discriminated against employees because of age, and (2) even if it had done so, its plans were "bona fide employee benefit plans," and thus were exempt from coverage of the ADEA pursuant to section 4(f)(2). As the Solicitor General correctly recognizes in his Brief, the Court need not reach the first issue if it finds that Westinghouse's plans are protected by section 4(f)(2). The Solicitor General also correctly recognizes that the Court in *Betts* rejected the interpretation of section 4(f)(2) that the EEOC has advanced in this case.

The Court's decision in *Betts* is dispositive of Westinghouse's claim that its plans are bona fide employee benefit plans. The Court in *Betts*, expressly rejected the arguments that the EEOC raised in this case and that the Third Circuit relied upon, and held that "the phrase 'any bona fide employee benefit plan such as a retirement, pension, or insurance plan' cannot reasonably be limited to benefit plans in which all age-based reductions in bene-

fits are justified by age-related cost considerations." *Betts*, 109 S. Ct. at 2865. Rather, the Court held that "§ 4(f)(2) generally protects age-based reductions in fringe benefits." *Id.* at 2868. Similarly, the Court rejected the view that an employee benefit plan is a subterfuge if it is not justified by age-related cost considerations. *Id.* at 2864. Given the finding below that Westinghouse's plans provide "fringe benefits"—a finding that the EEOC has never contested—this Court can and should hold that Westinghouse's plans are protected by section 4(f)(2).

In a similar case, *Abenante v. Fulflex*, 701 F. Supp. 296 (D.R.I. 1988) in the United States Court of Appeals for the First Circuit, the EEOC, as plaintiff-intervenor, recognized that *Betts* is dispositive of the issues raised in the instant petition. In that case, the EEOC advanced the same interpretation of section 4(f)(2) as was the basis of the Third Circuit's decision in the present case. On August 3, 1989, in a letter to the First Circuit, the EEOC recognized that *Betts* "is dispositive of this case" because the holding in *Betts* "is contrary to or renders irrelevant the arguments made in [the EEOC's] opening brief." (The EEOC's letter is reprinted and attached hereto as Appendix A). *Betts* mandates the same disposition of this case.

There is no sound reason to remand this case to the court of appeals. The EEOC's sole argument with respect to Westinghouse's plans has been that they were not bona fide employee benefit plans; the EEOC has never contended that Westinghouse's plans were "subterfuges." Indeed, in answers to Westinghouse interrogatories, the EEOC stated that it "did not contend that the subject Plans and Agreements constitute a subterfuge to evade or avoid the purposes of the Age Discrimination in Employment Act." (Reprinted and attached hereto as Appendix B). As a consequence, the EEOC failed to present any evidence in the district court regarding the subter-

fuge issue and did not brief the issue in the court below. Thus, it is hardly surprising that the court below did not find subterfuge. There is, in short, no issue to consider on remand.

CONCLUSION

For the reasons stated above, Westinghouse requests that the Court summarily reverse the judgment of the Third Circuit and order dismissal of the case below.

Respectfully submitted,

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Counsel for Petitioner

Dated: August 25, 1989

APPENDICES

APPENDIX A

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Washington, D.C. 20507

August 3, 1989

[SEAL]

Office of
General Counsel

Francis P. Scigliano, Clerk
United States Court of Appeals
for the First Circuit
1606 John W. McCormack Post Office
and Courthouse
Boston, Massachusetts 02109

Re: *Abenante v. Fulflex, Inc.*, Nos. 89-1179, 89-1180

Dear Mr. Scigliano:

The Equal Employment Opportunity Commission, Plaintiff-Intervenor, Appellant, is filing this letter to inform the Court that the recent Supreme Court decision in *Public Employees Retirement System of Ohio v. Betts*, 57 U.S.L.W. 4931 (U.S. June 23, 1989) is dispositive of this case. In *Betts*, the Supreme Court, in the context of a disability retirement plan, concluded that the phrase "'any bona fide employee benefit plan such as a retirement, pension, or insurance plan'" in section 4(f)(2) of the Age Discrimination in Employment Act, 29 U.S.C. 623(f)(2), is not limited to those plans in which "all age-based reductions are justified by age-related cost considerations." 57 U.S.L.W. at 4935. The Court held that "§ 4(f)(2) . . . exempt[s] the provisions of a bona fide benefit plan from the purview of the ADEA so long as the plan is not a method of discriminating in other, nonfringe-benefit aspects of the employment relationship.

. . ." *Id.* at 4936. This holding is contrary to or renders irrelevant the arguments made in our opening brief.

Specifically, the Commission argued that in reducing older employees' severance pay based on the present value of their pension benefits, defendant expressly discriminated against its older workers in violation of section 4(a)(1) of the ADEA. Br. at 9. The Commission argued that the reduction in severance pay was not immunized from liability by section 4(f)(2) because defendant's plan was not an employee benefit plan covered by section 4(f)(2), since the costs of separation pay did not increase with age. Br. at 27. The Commission argued further that, inasmuch as defendant had not shown a legitimate economic justification for the pension offset, defendant had failed to prove that the separation pay reduction was not a subterfuge to evade the ADEA's purposes, as required by section 4(f)(2). Br. at 36.

While, for the reasons stated in our main brief, the Commission continues to disagree with the district court's ruling on section 4(a)(1), *Betts*' interpretation of section 4(f)(2) renders the section 4(a)(1) issue moot. The Supreme Court rejected both of the Commission's section 4(f)(2) arguments: The Court concluded that the phrase " 'any bona fide employee benefit plan such as a retirement, pension or insurance plan' cannot reasonably be limited to benefit plans in which all age-based reductions in benefits are justified by age-related cost considerations." 57 U.S.L.W. at 4935. Likewise, the Court rejected the view that an employee benefit plan was a subterfuge to evade the ADEA's purposes if it was not justified by cost considerations. *Id.* at 4934. Consequently, *Betts* requires affirmance of the district court's ruling on the section 4(f)(2) issues in this case.

The Commission is filing this letter in lieu of a reply brief and believes that oral argument in this case is not necessary. Enclosed are copies of this letter for the Court. Copies have also been served on counsel of record.

Sincerly yours,
/s/ John F. Suhre

JOHN F. SUHRE
Attorney

Equal Employment Opportunity
Commission
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cc: Marc Gursky, Esq., Counsel for Plaintiffs-Appellants
Michael P. DeFanti, Esq., Co-Counsel for
Defendant-Appellee
Glen D. Nager, Esq., Co-Counsel for
Defendant-Appellee

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 83-5457

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff,

—VS—

WESTINGHOUSE ELECTRIC CORPORATION,
Defendant.

DEFENDANT'S FIRST SET OF
INTERROGATORIES TO PLAINTIFF

To: JAMES GARRETT, ESQ.
Trial Attorney
Equal Employment Opportunity Commission
Philadelphia District Office
127 N. Fourth Street
Philadelphia, Pennsylvania 19106
Attorneys for Plaintiff

COUNSEL:

Defendant Westinghouse Electric Corporation herewith serves upon you its First Set of Interrogatories in the above-entitled cause and demands answers thereto within the time provided by the Rules of Court.

* * * *

10. Does plaintiff contend that either the Westinghouse Pension Plan and/or the Pension and Insurance Agreement between Westinghouse Electric Corporation and the International Union of Electrical, Radio and Machine Workers, as in effect during the time period relevant to the instant action, constitute a subterfuge to evade or avoid the purposes of the Age Discrimination in Employment Act? If so, (a) specifically identify the portion or portions of the Plan and/or Agreement which are involved, (b) set forth specifically and in detail each and every fact upon which plaintiff relies to support its claim; and (c) identify each and every document relied upon to support this claim, listing its title, date, author, and custodian.

RESPONSE NO. 10:

Plaintiff does not contend that the subject Plans and Agreements constitute a subterfuge to evade or avoid the purposes of the Age Discrimination in Employment Act ("ADEA").

* * * *

CARPENTER, BENNETT & MORRISSEY
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By: /s/ Rosemary A. Hall
ROSEMARY A. HALL
A Member of the Firm

—and—

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Attorneys for Defendant
Westinghouse Electric Corporation

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Plaintiff's Response to Defendant's First Set of Interrogatories was served on counsel for Defendant by first class mail, postage prepaid, this 1st day of August, 1984, addressed as follows:

Dona S. Kahn, Esquire
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and

Rosemary Hall, Esquire
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/s/ Lanier E. Williams
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